Judy Sello
Senior Attorney

Room 3A229
One AT&T Way
Bedminster, NJ 07921
Tel: 908-532-1846
Fax: 908-532-1218
Email: jsello@att.com

January 14, 2005

Ex Parte

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-B204
Washington, DC 20554

Re: ***AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Card Services*, WC Docket No. 03-133**

Dear Ms. Dortch:

AT&T hereby responds to BellSouth's December 8, 2004 and GCI's January 10, 2005 *ex parte* letters in this docket concerning enhanced prepaid card ("EPPC") services.[1]

I. AT&T's EPPC Service Is An Information Service

First, BellSouth contends that AT&T's EPPC service cannot qualify for information service status because "the customer does not intend to purchase an information service." BellSouth *ex parte* at 1. Neither the statute nor any of the Commission's enhanced services rules or decisions have ever relied on customer intention in determining whether an offering is an information service, and to do so now would call into question the regulatory status of a wide array of services that are conceded today to be information services. Indeed, BellSouth is simply attempting to revive the *Computer I* "primary purpose" test that the Commission repudiated nearly twenty five years ago as dangerous, unworkable and antithetical to investment-inducing regulatory certainty.

---

[1] December 8, 2004 *ex parte* Letter from Stephen L. Earnest, BellSouth to Marlene H. Dortch ("BellSouth *ex parte*"); January 10, 2005 *ex parte* Letter from Lisa R. Youngers, GCI to Marlene H. Dortch ("GCI *ex parte*")

The Commission's enhanced services rules – which the Commission has repeatedly held to meet the statutory "information service" definition – require only that a service "provide" the subscriber with "additional, different, or restructured information." 47 C.F.R. § 64.702(a). There is no requirement that a service provider demonstrate customer motivation regarding, desire for, or even use of the additional information (or other enhancements) provided to the subscriber, and any such requirement would plainly be impossible to administer and a source of crippling regulatory uncertainty.

That is why the Commission has consistently held – in a line of cases that BellSouth does not address – that a service is an enhanced/information service so long as it includes *any* additional enhancements beyond basic transmission, without regard to how "primary" or "tangential" the enhancements may be. For example, in the *Cable Modem Declaratory Order*, the Commission held that cable modem service – which, of course, subscribers purchase "primarily" for its basic telecommunications functionality of "transmission between or among points specified by the user" (*i.e.*, between the subscriber's premises and distant servers that host web pages), of "information of the user's choosing" (*i.e.*, the web page content that the subscriber seeks to view), 47 U.S.C. § 153(48) – is an information service solely on the basis that it merely *offers* subscribers certain enhanced capabilities, such as functions that allow subscribers to create their own websites. *Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798, ¶ 38 & n.153 (2002) ("*Cable Modem Declaratory Order*"), *aff'd in relevant part, Brand X Internet Services* v. *FCC*, 345 F.3d 1120 (9th Cir. 2003).[2] A cable modem subscriber may use these capabilities only sparingly, "tangentially," or even *not at all*. Nonetheless, it is the fact that the capabilities are offered to the subscriber as part of the service that makes cable modem service an information service. *See also Report to Congress* ¶¶ 78-79 (Internet access is an information service even though subscriber "may not exploit [the information service features] of the service").

This is consistent with longstanding Commission precedent that regulatory classifications apply to *entire* services, not to individual components of services. "[A]n offering that constitutes a single service from the end user's standpoint" – as an EPPC service does – is not a basic telecommunications service "simply by virtue of the fact that it involves telecommunications components." *Report to Congress* ¶ 58 (*citing Computer II*, 77 F.C.C.2d at 420-28); *see also Report to Congress* ¶ 57 ("hybrid services are information services, and are not telecommunications services").

Indeed, the "primary purpose" test that BellSouth now posits was *expressly repudiated* in the Commission's 1980 *Computer II* decision, in which the Commission, based upon the unanimous views of the entire industry, established a bright-line rule that "[a]n enhanced service is *any* offering over the telecommunications network which is

---

[2] *See also id.* ¶ 35 (statutory definition of information service "rests on the function that is made available").

more than a basic transmission service." *Computer II*, 77 F.C.C.2d 384, ¶ 97 (1980) (emphasis added). *See also id.* ¶ 130 ("At the margin, some enhanced services are not dramatically dissimilar from basic services"). Responding to claims that it should continue the *Computer I* primary purpose test, the Commission labeled that approach a "stop-gap measure" that "will not result in regulatory certainty" and instead requires unacceptable "*ad hoc* determinations." *Id*. ¶ 107. The Commission stated unequivocally that its intention was to "draw a clear and, we believe, sustainable line between basic and enhanced services upon which business entities can rely in making investment and marketing decisions." *Id*. ¶ 101. BellSouth's call for a retreat from this bright-line rule and a return to the failed *Computer I* "primary purpose" test would eliminate the basis for holding that cable modem and many other Internet and IP-enabled services – including the Bells' own wireline broadband services – are information services. Such a reversal would have profound consequences for the Commission's broadband and Internet policies, which are founded fundamentally on the regulatory classification of these services as information services. The "primary purpose," and customer motivation for purchasing, VoIP services, for example, may be to obtain basic telecommunications capabilities.

Second, BellSouth's attempt to manufacture inconsistency between AT&T's position in this proceeding and its prior treatment of prepaid card services can only be designed to mislead. BellSouth (*ex parte* at 3) contends that AT&T itself recognized that its prepaid card services were not information services because AT&T continued to tariff prepaid card services as regulated services at least until 1998, despite the fact that AT&T had apprised the Commission in a 1994 cost allocation manual filing that it was offering an EPPC service on a nonregulated basis.[3] In fact, AT&T never tariffed its EPPC service. Rather, in reliance upon the Commission's clear enhanced services regulation, AT&T always offered its EPPC service *outside* of tariff as a nonregulated, enhanced service. That AT&T separately offered under tariff a *different* prepaid card service that provided the caller *only* with basic transmission capabilities is entirely consistent with AT&T's regulatory treatment of its EPPC service – and with the governing law that establishes a bright line rule that "hybrid" services, like EPPC service, that include both basic transmission capabilities and additional non-call-related information are information services.

Third, BellSouth's contentions (*ex parte* at 3-4) concerning what BellSouth calls the *IP-in-the-Middle Order*, 19 FCC Rcd. 7457 (2004), also miss the mark. The "*IP-in-the-Middle Order*" provides an *independent* ground for treating EPPC services as subject to the ESP exemption to the extent that EPPC calls are transported over Internet backbone facilities in Internet protocol. In response to concerns of other VoIP providers that their services would be impacted by the Commission's ruling with respect to AT&T's phone-to-phone VoIP service, the Commission expressly limited its decision to

---

[3] *See, e.g.*, November 1, 2004 *ex parte* Letter from Amy L. Alvarez, AT&T to Marlene H. Dortch ("November 1 *ex parte*").

VoIP calls that utilize 1+ dialing. 19 FCC Rcd. 7457, ¶ 13 and n.58. EPPC calls are *not* 1+ calls because a caller must first dial an 8YY number to reach the EPPC platform, and then dial the called party's number. AT&T understands that other prepaid card providers (for example, Net2Phone) are, in fact, utilizing VoIP for transport of platform-based prepaid card services, and treating such calls as subject to the ESP exemption from access charges or paying, at most, interstate access charges (irrespective of whether such services provide customers with additional non-call-related information). Accordingly, AT&T has asked the Commission to rule that if AT&T provides its EPPC services in this manner using its Internet backbone, AT&T's service will likewise be treated as an interstate information service, as a matter of competitive parity.[4] The Commission could not lawfully single out AT&T for regulatory treatment different from these other VoIP prepaid card providers.[5]

II. AT&T's EPPC Service Should Be Treated As An Interstate Service

Contrary to BellSouth's and GCI's suggestions, the Commission has ample authority to regulate EPPC as a jurisdictionally interstate service. BellSouth (*ex parte* at 4-8) mistakenly argues that AT&T's contention that the Commission has clear interstate jurisdiction under existing law to regulate EPPC services is premised on a "two-call" jurisdictional theory that has been rejected by the Commission. To the contrary, interstate jurisdiction over EPPC calls that indisputably contain non-call-related interstate "communications by wire" (from the calling card platform to the calling party) does not conflict at all with any Commission precedent.

Throughout its *ex parte*, BellSouth consistently confuses traditional prepaid card services that offer only bare transmission between two parties with the enhanced prepaid card services at issue here. In a typical EPPC call, a third party (often, but not always, the retailer) communicates with the cardholder through messages stored at the enhanced platform. These third party communications may be simple advertisements, public service messages, solicitations for charitable donations, or even political messages. These communications between the platform and the cardholder (via the interstate transmission of computer stored messages) are indisputably delivered "by wire" between two states. Indeed, to suggest that such communications are not "interstate communications" within the meaning of the statute borders on frivolous. 47 U.S.C. §§ 152(a), 153(22). By contrast, in all of the "two-call" cases on which BellSouth and others have relied in the past, the platform performed *only* intermediate switching

---

4 *See, e.g.*, November 22, 2004 *ex parte* Letter from Judy Sello, AT&T to Marlene H. Dortch ("November 1 *ex parte*").

5 *See, e.g., Adams Telcom, Inc.* v. *FCC*, 38 F.3d 576, 581 (D.C. Cir. 1994) ("We have . . . reminded the FCC of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment" (internal quotation marks omitted)); *Melody Music, Inc.* v. *FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965); *FEC* v. *Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986).

functions and all interactions between the cardholder and the platform were related to the routing or billing of the end-to-end communication between the called and calling parties.[6]

Moreover, the Internet access cases on which BellSouth relies (*ex parte* at 4-6) strongly support *AT&T*. Contrary to BellSouth's suggestion, it has always been understood that Internet access involves a *mix* of intrastate communications that end at the ISP and communications that continue to a distant website (which may be either intrastate or interstate). The Commission's Internet access orders unequivocally establish that where it is impractical separately to regulate the individual intrastate and interstate communications that may take place in a single call or session, the service as a whole is to be regulated as interstate. *GCI* v. *ACS*, 16 FCC Rcd. 2834, ¶ 24 (2001) ("[i]t is well settled that when communications, such as ISP traffic, are jurisdictionally mixed, containing both interstate and intrastate components, the Commission has authority to regulate such communication"); *Intercarrier Compensation for ISP-Bound Traffic*, Notice of Proposed Rulemaking, 14 FCC Rcd. 3689, ¶ 18 (1999); *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, ¶¶ 57-58 (2001) (*"ISP-Bound Traffic Order")*; *GTE Tel. Operating Cos.*, 13 FCC Rcd. 22466, ¶¶ 22-26 (1998) (DSL services should be tariffed at the state level only where the service is entirely intrastate). EPPC services are of the same character: in an EPPC call, the platform is *not* merely "equipment that makes the payment for the call, on a prepaid basis, possible," as BellSouth contends (*ex parte* at 6), but rather stores non-call-related information and facilitates interstate communication of that information.

Nor is the Commission's recent *Thrifty Call Order* to the contrary.[7] Thrifty Call was a long distance reseller that operated a switch in Atlanta, Georgia. Unaffiliated IXCs carried calls from North Carolina and Florida to Thrifty Call's switch in Atlanta, and Thrifty Call then carried those calls back for termination in the originating state. Thrifty Call sought a declaratory ruling that its calls were interstate within the meaning of BellSouth's Feature Group D tariff, because from Thrifty Call's perspective the call entered its network in Georgia, rather than in the originating state. The Commission found the calls to be intrastate, but it made clear (even in the passage BellSouth quotes)

---

6 *E.g., Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation*, 7 FCC Rcd. 1619 (1992) ("*BellSouth MemoryCall Order*"); *Time Machine, Inc., Request for a Declaratory Ruling Concerning Preemption of State Regulation of Interstate 800-Access Debit Card Telecommunications Services*, 11 FCC Rcd. 1186 (1995); *Long Distance USA, Inc. et al.* v. *Bell Tel. Co. of Pa.*, 10 FCC Rcd. 1634 (1995); *Southwestern Bell Tel. Co., Transmittal Nos. 1537 and 1560*, 3 FCC Rcd. 2339, ¶¶ 25-28 (1988).

7 *See* BellSouth *ex parte* at 6 (quoting *Thrifty Call Inc. Petition for Declaratory Ruling Concerning BellSouth Telecommunications Inc, Tariff F.C.C. No. 1*, CCB/CPD File No. 01-17, Declaratory Ruling, DA 04-3576 (rel. Nov. 12, 2004).

that the calls were intrastate because Thrifty Call provided *only* intermediate switching. *See Thrifty Call Order* ¶ 15 ("interstate communication extends from its inception to its completion, regardless of any intermediate points of switching or exchanges between carriers"). EPPC, by contrast, involves *separate* interstate communications, unrelated to call routing or billing that unquestionably trigger interstate jurisdiction over the calls or sessions that include those interstate communications.

This is further confirmed by a straightforward application of the *Vonage Order*.[8] *Cf.* BellSouth *ex parte* at 7-8. Like the services at issue in the *Vonage Order*, AT&T's EPPC service enables the end user to place telephone calls from wherever the end user is geographically located to any other point in the world. Also like the services at issue in the *Vonage Order,* it is impossible at the time the service is sold to the end user for the seller of the service to know the beginnings or endpoints of communications that will be made using the service. And, even more so than the services at issue in the *Vonage Order,* virtually all communications sessions made using the EPPC service involve *some* interstate communication through, at a minimum, the calling party's receipt of, and interaction with, non-call-routing related information stored at the platform.[9]

---

[8] In *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267 (rel. Nov. 12, 2004) ("*Vonage Order*"), the Commission considered "mixed-use" or "jurisdictionally mixed" services that, like AT&T's EPPC service, can involve both interstate and intrastate communications (often in a single communications session). The Commission recognized that irrespective of information service, telecommunications service or other definitional classifications, such a service should not be burdened by state economic regulation where the characteristics of the service "preclude any practical identification of, and separation into, interstate and intrastate communications" and permitting state regulation "would thwart federal law and policy." *Id*. ¶ 14. In such circumstances, the Commission exercises its authority "to preempt inconsistent state regulations that thwart federal objectives, treating jurisdictionally mixed services as interstate with respect to the preempted regulations." *Id.* ¶ 17; *see also id.* ¶ 22.

[9] As AT&T has previously explained, 17-20% of EPPC calls involve *only* an interstate communication with the platform; more than 65% of all EPPC calls are *entirely* interstate (or international), on a calling-to-called party basis, even disregarding the interstate communication from the platform to the calling party; and many other EPPC calls involve multiple interstate communications with the platform interspersed with multiple calling/called party communications that may be between parties in the same or different states. *See* October 12, 2004 *ex parte* Letter from Judy Sello, AT&T to Marlene H. Dortch, at 3 ("October 12 *ex parte*").

Moreover, AT&T's EPPC service, like the services at issue in the *Vonage Order*, "enable subscribers to utilize multiple features that access different" locations and stored information "during the same communication session . . . none of which the provider has a means to separately track or record." *Id*. ¶ 25. And, as in the case of Vonage's service, AT&T's EPPC service does not separately identify and measure the individual intrastate and interstate communications that may occur in a single communications session. There is accordingly no practical, service-driven mechanism to "sever" EPPC into discrete interstate and intrastate communications that would allow imposition of intrastate access charges only to intrastate calling functionalities without also interfering with the interstate aspects of EPPC. *See Vonage Order* ¶ 32.[10] *See also id.* ¶ 29 (where there is no "service-driven reason to incorporate such capability . . . [w]e have declined to require such separation in those circumstances, treating the services at issue as jurisdictionally interstate for the particular regulatory purposes at issue and preempting state regulation where necessary").[11]

GCI's contention (*ex parte* at 3) that the Commission reaffirmed in *Vonage* and *Pulver* that the called and calling party "endpoints" of calls are necessarily determinative of jurisdiction is a blatant misrepresentation of those Commission decisions. GCI notes that the Commission referenced its traditional end-to-end analysis of simple two endpoint calls in *Vonage* but fails to point out that the Commission did so in explaining why that approach is "difficult to apply" to communications sessions that, like EPPC calls, involve *multiple* intrastate and interstate communications (and hence multiple end points). That is why in both *Vonage* and *Pulver*, the Commission exercised exclusive interstate jurisdiction over mixed-use services in their *entirety*, notwithstanding the undisputed presence of "end-to-end" intrastate calls.[12] For these reasons, as in *Vonage*,

---

[10] Although the Commission also noted two other characteristics of the Vonage service, broadband and IP, those characteristics are relevant not to the practicality of separately identifying and tracking interstate and intrastate communications – as the *Vonage Order* notes, the cable broadband IP services at issue, for example, have fixed origination points – but to the federal policies that would be undermined by state economic regulation. And, as AT&T has previously demonstrated, different, but equally important, federal policies favoring, *inter alia*, affordable services for underserved consumers, would be undermined by the imposition of intrastate access charges on EPPC services. *See* October 12 *ex parte* at 4-5.

[11] *See also Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd. 3307, 3320-21, ¶ 21 (2004) ("*Pulver"*) ("Attempting to require Pulver to locate its members for the purpose of adhering to a regulatory analysis that served another network would be forcing changes on this service for the sake of regulation itself, rather than for any particular policy purpose.")

[12] *GCI* also misstates the record in suggesting (*ex parte* at 1, 4-5) that the Commission must disregard its jurisdiction precedents involving multiple

(footnote continued on following page)

it is vitally important that the Commission assert jurisdiction over these interstate services, and preempt imposition of intrastate access charges. For recent immigrants, military personnel and many low-income consumers, prepaid cards are often a substitute for wired or wireless phone service and are their *only* way to make telephone calls. The Commission has a strong interest in maintaining the availability of such options for lower income end-users under its traditional universal service authority under, 47 U.S.C. § 151, and under the 1996 Act amendments, 47 U.S.C. § 254(b)(1), (i). Because enhanced prepaid cards are disproportionately purchased by low-income, minority, and other protected groups, it would be arbitrary and inequitable to force those end-users to bear the burden of intrastate access charges, which concededly contain implicit subsidies that violate the Act. *See* 47 U.S.C. § 254(f), (k).

Indeed, it would be especially perverse for the Commission to reach out now to impose the burden of intrastate access charges on EPPC services used disproportionately by disadvantaged groups at the same time that it continues to allow broadband-based VoIP services – which are, of course, purchased primarily by wealthier consumers that have broadband connections – to avoid access charges altogether. That could only signal that this is a Commission that has completely lost sight of its core Communications Act mandate to ensure that communications services are universally available at reasonable charges to all consumers, including those with fewer resources and opportunities. Pursuing a path of *ad hoc* determinations that single out disadvantaged consumers for ever greater burdens under broken and entirely arbitrary universal service and intercarrier compensation regimes may advance incumbent interests and delay the complete collapse of the existing regulatory regimes, but it hardly advances the public interest. The Commission should instead expeditiously complete desperately needed intercarrier compensation and universal service reform and, in the interim, continue to shield *both* new VoIP services and the EPPC services upon which

---

(footnote continued from previous page)

communications in a single session to avoid "encroach[ing]" on the rulings of the Regulatory Commission of Alaska ("RCA"). In fact, the RCA has expressly recognized in at least two orders related to EPPC the Commission's primacy in this area. First, on August 1, 2003 (Order U-97-120(5)), the RCA granted a stay, pending a final decision by the Commission on AT&T's petition, of a prior order in which the RCA had required AT&T Alascom to pay intrastate access charges on enhanced prepaid card calls. And in lifting the stay prospectively effective April 1, 2004 (Order U-03-49(5)), the RCA expressly held that if the Commission rules in AT&T's favor, local exchange carriers who have collected intrastate access charges from AT&T Alascom will have to issue credits to AT&T. *Id*. at 9.

low-income consumers, recent immigrants, and military personnel rely from the most destructive aspects of the current regimes.[13]

Nor is it any answer to tell EPPC providers that they can avoid the prospective harms from a ruling that intrastate access charges apply (notwithstanding the undisputed presence of interstate communications) by passing those costs on to cardholders by charging separate – and necessarily much higher – rates when prepaid cards are used to make calls to called parties located in the same state as the calling party. *See* BellSouth *ex parte* at 8-9. Here, BellSouth makes its own preferences and interests quite clear: if further lining my already quite full pockets means jacking up the rates on low-income users, senior citizens, military personnel, so be it. The Commission's and the public's interests are surely quite different. In any event, the Commission has previously held, at BellSouth's urging, that providing and marketing an interstate-only service is impractical and would not be accepted in the marketplace. *See, e.g., BellSouth MemoryCall Order* ¶¶ 13-16 ("it is not feasible to market interstate and intrastate enhanced services separately"). This is even more true of prepaid card services, which are inherently mobile. Purchasers of prepaid card services do not want the availability or rates of domestic calls to change depending on where the call is made.

In short, it is now more clear than ever that the Commission can and should clarify that EPPC services are, for economic regulatory purposes, interstate services that are not subject to intrastate access charges. If the Commission were to abdicate that authority, and permit the incumbent LECs to assess intrastate access charges, it would accomplish nothing other than removing a uniquely affordable long-distance option for low-income and military end-users, while further inflating incumbent LECs' already

---

[13] BellSouth repeats its irresponsible and unsupported assertions that intrastate access charges and USF assessments inapplicable to these services have "gone directly to AT&T's profits." BellSouth *ex parte* at 8. BellSouth again cites no evidence for these accusations and simply ignores the record evidence that other prepaid card providers provide cards at rates so low that it is quite obvious that these carriers are not paying intrastate access charges. *See, e.g.*, July 20, 2004 *ex parte* Letter from Robert W. Quinn, Jr., AT&T to Marlene H. Dortch. In fact, as the Commission has repeatedly held, the long-distance market is extremely competitive, and any access or USF savings that AT&T has realized have been passed on in the form of lower rates to those who use these enhanced services – who are disproportionately low-income users, recent immigrants, retirees, and military personnel who might otherwise be priced out of the market if the Commission were to rule in BellSouth's favor. Indeed, BellSouth's accusations are particularly ironic given that BellSouth has received widespread deregulation of its broadband and other services based only on the sporadic existence of duopolies.

excessive profit margins and creating unlawful discrimination in favor of resale providers.[14]

One electronic copy of this Notice is being submitted to the Secretary of the FCC in accordance with Section 1.1206 of the Commission's rules.

Respectfully submitted,

/s/

Judy Sello

cc: Christopher Libertelli
Matthew Brill
Daniel Gonzalez
Jessica Rosenworcel
Scott Bergmann
Jeffrey Carlisle
Michelle Carey
Tamara Preiss
Lisa Gelb
Steve Morris
Paul Moon

[14] *See* October 12 *ex parte* at 5-6.